Supreme Court, U.S.
FILED
NOV 13 2000
CLERK

(5)

No. 00-24

IN THE

Supreme Court of the United States

NOV 13 2000

PGA TOUR, INC.,

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

H. BARTOW FARR, III *
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, NW
Suite 1000
Washington, DC 20036
(202) 775-0184

WILLIAM J. MALEDON
ANDREW D. HURWITZ
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012
(602) 640-9000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

4/9

QUESTIONS PRESENTED

1. Whether Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, governs job-related standards for persons (here, professional golfers) working at places of public accommodation.

2. Whether, if so, Title III requires professional sports organizations to grant selective waivers of their substantive rules of athletic competition in order to accommodate disabled competitors.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	2
SUMMARY OF ARGUMENT	10
ARGUMENT	15
I. TITLE III OF THE AMERICANS WITH DISABILITIES ACT PROVIDES NO BASIS FOR CLAIMS OF DISCRIMINATION BY PERSONS, LIKE RESPONDENT, WHO ARE NOT CLIENTS OR CUSTOMERS OF A PUBLIC ACCOMMODATION	15
II. TITLE III DOES NOT REQUIRE THE TOUR TO FUNDAMENTALLY ALTER THE NATURE OF ITS CHAMPIONSHIP-LEVEL EVENTS BY ALLOWING DIFFERENT COMPETITORS TO PLAY BY DIFFERENT SUBSTANTIVE RULES	30
CONCLUSION	42

TABLE OF AUTHORITIES

Cases — Page

Alexander v. Choate, 469 U.S. 287 (1985) 31
Alexander v. Rush N. Shore Med. Ctr., 101 F.3d 487 (7th Cir. 1996) 25
Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971) 25
Birchem v. Knights of Columbus, 116 F.3d 310 (8th Cir. 1997) 17
Bledsoe v. Palm Beach County Soil & Water Conservation Dist., 133 F.3d 816 (11th Cir.) (1998) 29
Community for Creative Non-Violence v. Reid, 490 U.S. 730 (1989) 25
Consolidated Rail Corp. v. Darrone, 465 U.S. 624 (1984) 25
Doe v. Univ. of Maryland Med. Sys., 50 F.3d 1261 (4th Cir. 1995) 29
Dykes v. DePuy, Inc., 140 F.3d 31 (1st Cir. 1998)
EEOC v. AIC Security Investigations, Inc., 55 F.3d 1276 (7th Cir. 1995) 28
EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983) 25
Holmes v. Texas A & M Univ., 145 F.3d 681 (5th Cir. 1998) 29
Menkowitz v. Pottstown Memorial Med. Ctr., 154 F.3d 113 (3d Cir. 1998) 26
NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) 25
Nationwide Mut. Ins. Co. v. Darden, 503 U.S. 318 (1992) 25
North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982) 26
Olinger v. United States Golf Ass'n, 205 F.3d 1001 (7th Cir. 2000) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

Parker v. Metropolitan Life Ins. Co., 121 F.3d 1006 (6th Cir. 1997) 17
Patterson v. McLean Credit Union, 491 U.S. 164 (1989) 29
Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926 (8th Cir. 1994) 35
Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995) 35
School Bd. of Nassau County, Florida v. Arline, 480 U.S. 273 (1987) 32
Southeastern Community College v. Davis, 442 U.S. 397 (1979) 13, 31
United Steelworkers of America v. Weber, 443 U.S. 193 (1979) 28
Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir. 1999) 35
Zimmerman v. Oregon Dept. of Justice, 170 F.3d 1169 (9th Cir. 1999) 29

Codes and Regulations

28 U.S.C. § 1254(1) 2
§ 1331 5
29 U.S.C. § 623(a)(1)-(3) 24
§ 794 24
§ 794(d) 27
42 U.S.C. § 1981 29
Civil Rights Act of 1964:
42 U.S.C. § 2000a 26
§ 2000e-2(a) 17
§ 2000e-2(a)(1) 24
§ 2000e-2(a)(2) 24
§ 2000e(b) 24
§ 2000e(f) 24

TABLE OF AUTHORITIES—Continued

Page

Americans with Disabilities Act:
42 U.S.C. § 12101 2
§ 12111 27
§ 12111(8) 6, 16
§ 12112 16
§ 12112(a) 6, 24
§ 12112(b)(1) 16
§ 12112(b)(2) 11, 20
§ 12112(b)(4) 16
§ 12112(b)(5)(B) 16
§ 12112(b)(6) 17
§ 12117(a) 12, 29
§ 12181 10
§ 12181(7)(A)-(L) 8, 17, 23, 28
§ 12182(a) 6, 11, 18, 19
§ 12182(b) 20
§ 12182(b)(1) 18
§ 12182(b)(1)(A)(iv) 11, 19
§ 12182(b)(2) 18
§ 12182(b)(2)(A)(ii) 7, 31
§ 12183 21
§ 12189 7
28 C.F.R. ch. 1, pt. 36, § 36.101 27
28 C.F.R. ch. 1, pt. 36, App. B 18, 23, 32
29 C.F.R. ch. xiv, pt. 1630, § 1630.1 27

Congressional Materials

H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 54 (1990) 24
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 54-83 (1990) 22
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 59 (1990) 21

TABLE OF AUTHORITIES—Continued

Page

H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) 12, 15, 21, 26
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99-129 (1990) 21
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 104 (1990) 19,20
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 116-21 (1990) 21
H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 117 (1990) 21
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 26 (1990) 25
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 31 (1990) 24
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 31-49 (1990) 22
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 36-37 (1990) 21
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 53-69 (1990) 21
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 54 (1990) 18
H.R. Rep. No. 101-485, pt. 3, 101st Cong., 2d Sess. 62-66 (1990) 21

Other Materials

The American Heritage Dictionary of the English Language at 1742 (3d ed. 1992) 34
The New York Times, October 11, 2000, p. C5 28

IN THE

Supreme Court of the United States

No. 00-24

PGA TOUR, INC.,[1]

Petitioner,

v.

CASEY MARTIN,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (J.A. 34-48) is reported at 204 F.3d 994. The opinions of the district court (J.A. 49-73, 74-88) are reported at 994 F. Supp. 1242 and 984 F. Supp. 1320.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 6, 2000. On May 17, 2000, Justice O'Connor extended the time to file a petition for a writ of certiorari to and including July 5, 2000. The petition was filed on July 5, 2000, and was granted on Septem-

[1] Petitioner, PGA TOUR, Inc., does not have any parent corporations, subsidiaries, or affiliates that have issued shares to the public.

ber 26, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.* are set forth in the appendix to the petition at Pet. App. 56a-96a.

STATEMENT

This case raises the questions whether respondent may invoke the "public accommodations" provisions of Title III of the Americans with Disabilities Act (the "ADA" or "the Act"), 42 U.S.C. §§ 12101 *et seq.*, to challenge the substantive competitive rules established for professional golfers at tournaments conducted by the PGA TOUR, and, if so, whether Title III compels the Tour to grant selective waivers of its substantive rules in order to accommodate disabled competitors. The district court held that Title III of the Act did apply to this claim and that Title III mandated waiver of a substantive rule unless it could be shown that the waiver would give the disabled competitor an unfair advantage over a hypothetical able-bodied competitor. The court of appeals affirmed.

A. The issues in this case arise out of a challenge by respondent, a disabled professional golfer, to a requirement that he comply with all of the competitive rules applicable to certain golf tournaments sponsored by PGA TOUR, Inc. (the "Tour")—including, specifically, the so-called "walking rule," which requires golfers to walk the golf course during the competition. These elite tournaments, which are part of the PGA TOUR and the Buy.com TOUR (formerly the NIKE TOUR) and watched by spectators both in person and on television throughout the world, test the ability of professional golfers to perform at the highest levels of golf competition.[2] Of the approximately 25 million golfers in the United States, only about 200 are eligible to play in PGA TOUR events each year, and only about an additional 170 are eligible to play in Buy.com TOUR events. Both PGA TOUR and Buy.com TOUR competitions are, by design, among the most difficult and challenging golf tournaments in the world.

The Rules of Golf provide that "[t]he Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules." *See* J.A. 104; Rules of Golf, Rule 1.1. Those "Rules," which come from several different sources, become increasingly demanding as the level of competition rises.[3] With respect to the Tour events at issue in this case, the Tour requires competitors to observe a set of substantive rules that are intended to reflect the highest level of competition. In addition to other rules specified by the "hard card" (*see* note 3 *supra*), therefore, the Tour invokes several of the optional rules from the Rules of Golf, which are explicitly intended to make competitions more exacting.[4] For example, the Tour makes

[2] PGA TOUR, Inc., a non-profit entity formed in 1968 to promote high-level golf competition and golf tournaments, sponsors golf competitions on three professional golf tours: the PGA TOUR, the Buy.com TOUR, and the SENIOR PGA TOUR. Respondent is not eligible to compete on the SENIOR PGA TOUR, which is limited to golfers age fifty and older, and this lawsuit involves only PGA TOUR and Buy.com TOUR (formerly NIKE TOUR) events. J.A. 245-46. All references herein to "Tour events" and the like are to tournaments on those tours, not on the SENIOR TOUR.

[3] The rules governing Tour competitions come from three sources: (1) the Rules of Golf, as promulgated by the United States Golf Association ("USGA"); (2) the Conditions of Competition and Local Rules (the so-called "hard card"), containing additional rules applicable specifically to all Tour events; and (3) the Notice to Competitors, containing certain tournament-specific rules. J.A. 246-47.

[4] Among the rules prescribed by the "hard card" is a rule requiring competitors to use only "conforming" golf ball brands that satisfy objective USGA standards. This rule eliminates the competitive differences that would result if players used widely differing golf balls.

competitors adhere to the "one-ball rule," requiring that they use the same brand and type of golf ball throughout a round. *See* J.A. 122. Taking account of the fact that different types of golf balls perform differently in wind and other conditions when struck by highly-skilled golfers, this rule makes the competition more challenging by preventing a competitor from, among other things, using one type of ball when hitting into the wind, and another type when hitting with the wind. The violation of any substantive rule results in a penalty or disqualification. *See* J.A. 104-26.

The Tour competitions—like every other elite golf competition in the world—require that players walk the golf course during tournaments.[5] This "walking rule," which has been part of Tour events from their inception, is specifically intended to add the element of physical stress and fatigue to the competition. *See* J.A. 174, 245-46, 248-49. During four days of competition, a golfer typically must walk twenty to twenty-five miles, often in intense heat, in inclement weather, or over hilly terrain. The cumulative fatigue resulting from this requirement may, and frequently does, affect golfers' concentration, shot-making ability, and overall performance. *See* J.A. 169-70, 177-78, 190, 193-94, 234-36. The extent of such fatigue is impossible to quantify but will vary from golfer to golfer, depending upon factors like weather conditions, temperature, the terrain of the golf course, different golfers' psychological ability to cope with stress, the golfers' age and extent of physical conditioning, and so forth. J.A. 210-11.[6]

[5] The PGA TOUR "hard card" provides: "Players shall walk at all times during a stipulated round unless permitted to ride by the PGA TOUR Rules Committee." The Buy.com TOUR "hard card" contains virtually identical language. (This rule, without the "unless" clause, is set forth in the Appendix to the Rules of Golf. J.A. 125.) The Rules Committee can permit players to ride only in those limited instances when, due to unusual course configuration or for safety reasons (*e.g.*, crossing streets), it is deemed appropriate to shuttle all players short distances during an event. The Rules Committee cannot permit, and never has permitted, a competitor to use a golf cart in the competition itself. J.A. 253-54.

The Tour has long maintained that, to ensure the integrity of its competitions and to maintain public confidence, all competitors must observe the substantive rules established for a particular tournament. As a result, the golfers participating in Tour events are required to compete under the same conditions. No competitor is given an allowance or advantage because of differences in strength or other physical characteristics. Tournament officials monitor each Tour event, and players themselves are obligated to report any violation of the rules.

B. Respondent Casey Martin is a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome, a congenital vascular condition that precludes blood from properly re–circulating up his right leg. This condition interferes with his ability to walk, and causes him pain. Respondent thus has difficulty in walking the required distances in professional golf tournaments sponsored by the Tour.

In 1997, respondent entered the Tour's National Qualifying Tournament, which is used to select members for the NIKE TOUR (now the Buy.com TOUR) and PGA TOUR. At the final stage, during which the "walking rule" was invoked, respondent sought permission to use a golf cart. The Tour, in accordance with its rules, denied the request. Respondent then filed this action, pursuant to 28 U.S.C. § 1331, seeking a preliminary and permanent injunction

[6] The Tour also takes steps to make the course conditions for its high-level events more adverse than usual. For example, the rough (the area beside the fairway) is grown longer than normal, pins are placed in more difficult positions on the greens, and tee boxes are moved back to maximize the distance on each hole. The Tour uses these and other measures to define the nature of its high-level competitions, distinguishing them from recreational golf and other less exacting competitions, including its own SENIOR TOUR. J.A. 258-59.

against enforcement of the "walking rule" in the Qualifying Tournament and in subsequent Tour competitions for which he qualified.

Respondent alleged that the refusal of the Tour to waive the "walking rule" violated both Title I and Title III of the Act. His "Employment Discrimination" claim under Title I asserted that he was a "qualified individual with a disability," J.A. 96; *see* 42 U.S.C. § 12111(8),[7] and that the Tour had "discriminated against him because of his disability in regard to job application procedures, hiring, advancement, employment compensation, job training and other terms, conditions, and privileges of employment." J.A. 96; *see* 42 U.S.C. § 12112(a).[8] His "Public Accommodation Discrimination" claim under Title III alleged, among other things, that the Tour had failed "to provide [respondent] with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others on the NIKE and PGA TOURS." J.A. 94; *see* 42 U.S.C. § 12182(a).[9] With respect to both claims, respondent stated

[7] Section 12111(8) reads: "The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job."

[8] Section 12112(a) reads: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."

[9] Section 12182(a) reads: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." Respondent also sought relief under 42 U.S.C. § 12189, claiming that the NIKE TOUR was a course or examination related to professional credentialing and that the "walking rule" constituted discrimination in this examination.

that "[b]ecause of his disability, [he] cannot effectively compete in the NIKE TOUR or the PGA TOUR or obtain compensation, benefits, privileges or advantages from the NIKE TOUR or the PGA TOUR unless he is permitted to use a golf cart in the NIKE or PGA TOUR events." J.A. 93.

The district court rejected the Title I claim, finding that respondent was an independent contractor, not an employee of the Tour, and thus not covered by Title I. J.A. 58. The court held, however, that Title III required a waiver of the "walking rule." In reaching this conclusion, the district court first resolved the threshold issue whether Title III, which addresses the equal enjoyment of goods and services at "places of public accommodation," applies to *competitors* in a sporting event viewed by the public, determining that Title III extends not just to "those areas actually accessed by the public at large," J.A. 85, but also to the "playing area" as well. J.A. 86. Based on that theory, the court concluded that Title III required organizations operating places of public accommodation to modify their policies for persons competing within the playing area, as well as for spectators and other attendees at the event. J.A. 87-88.

The district court further held that a waiver of the "walking rule" for respondent would not "fundamentally alter" the nature of Tour events. *See* 42 U.S.C. §12182(b)(2)(A)(ii).[10]

[10] Section 12182(b)(2)(A)(ii) defines as discrimination: "a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would *fundamentally alter* the nature of such goods, services, facilities, privileges, advantages, or accommodations" (emphasis added).

The court acknowledged that the "walking rule" is a substantive rule of Tour events—that is, a rule that is intended to, and does, potentially affect the outcome of the tournaments—expressly finding that its purpose is to affect performance in those competitions by "inject[ing] the element of fatigue into the skill of shot-making." J.A. 65-66. Notwithstanding that finding, however, the court agreed that it was proper to make "an individualized inquiry into the necessity of the walking rule *in Casey Martin's case* . . . ," J.A. 62 (emphasis added), asking whether his use of a golf cart would give him an unfair competitive advantage. After stating that, for an able-bodied competitor, "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances," J.A. 66, the district court concluded that, because of his disability, the "fatigue [Martin] endures . . . is undeniably greater than the fatigue injected into tournament play on the able-bodied by the requirement that they walk from shot to shot." J.A. 68. The court thus decided that the purpose of the "walking rule"—to subject competitors to the added element of physical stress and fatigue—was satisfied with respect to respondent by virtue of his disability, and it enjoined the Tour from requiring him to comply with the rule.

C. The Ninth Circuit affirmed. Like the district court, it first declined to draw a distinction, for purposes of applying Title III, between competitors within the playing area of a golf course and spectators in areas open to the general public. Although the Ninth Circuit acknowledged the argument that a golf course during a professional tournament is not being used as a "place of exercise or recreation," *see* 42 U.S.C. § 12181(7)(L), it did not actually resolve whether that fact took the golf course outside the definition of a "public accommodation," instead stating that "[i]f a golf course during a tournament is not a place of exercise or recreation, then it is a place of exhibition or entertainment [*see* 42 U.S.C. § 12181(7)(C)]." J.A. 38. Having reached that conclusion, it went on to decide that Title III applied equally to players competing for prize money as part of Tour events and to persons enjoying those events as spectators. Dismissing arguments to the contrary, the court declared that there was no "justification for drawing a line between use of a place of public accommodation for pleasure and use in the pursuit of a living." J.A. 41.

The Ninth Circuit then held that a waiver of the "walking rule" for respondent would not impermissibly transform Tour competitions. Although the Ninth Circuit did not question that the "walking rule" was a valid substantive rule, J.A. 42-43, it rejected the argument that the waiver of any substantive rule—by destroying the uniformity of rules for all competitors—fundamentally alters the nature of a high-level athletic competition. Rather, the court of appeals conducted a two-part inquiry into, *first*, whether the rule at issue was a "fundamental" rule and, *second*, whether a waiver of the rule for respondent would give him an "unfair advantage." J.A. 46; *see also* J.A. 45 ("[t]he issue here is not whether use of carts generally would fundamentally alter the competition, but whether the use of a cart by Martin would do so"). Pointing to the district-court finding that the fatigue caused by walking during a golf tournament "cannot be deemed significant under normal circumstances," J.A. 43 (internal quotation marks omitted), the Ninth Circuit saw no basis for accepting that "walking is fundamental to the competition." J.A. 45. The court then compared the fatigue suffered by respondent with a golf cart to the fatigue suffered by "able-bodied" golfers without one, ultimately concluding that "providing Martin with a golf cart would not give him an unfair advantage over his competitors." J.A. 48.[11]

[11] The Ninth Circuit did not address respondent's alternative arguments, rejected by the district court, that respondent was an employee of

SUMMARY OF ARGUMENT

The decision of the Ninth Circuit is incorrect for two independent reasons. *First*, Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq.*, provides no basis for claims of discrimination by persons, like respondent, who are not "clients or customers" of a public accommodation. *Second*, even if it did, Title III would not require the Tour to "fundamentally alter" the nature of its championship-level competitions by allowing different competitors to play by different substantive rules.[12] Either ground is sufficient to reverse the judgment below.

I.

The PGA TOUR is "part of the entertainment industry, offering competitive athletic events to the public . . . ." J.A. 79. The claim brought by respondent, a disabled professional golfer, seeks to alter the rules established for those "competitive athletic events"—in particular, to obtain an individual waiver of the "walking rule"—so that he can perform as part of the events themselves. The nature of this claim, however, brings it outside the ambit of Title III. As the language, legislative history, and structure of the Act make clear, Title III is intended to confer enforceable rights on clients and customers of places of public accommodation, not on persons working to provide those clients and customers with the relevant goods and services.

The subject to which Title III is addressed is discrimination in the marketplace. Whereas Title I of the Act deals directly

---

the Tour covered by Title I and that the Buy.com TOUR competitions were a "course or examination" under Title III. J.A. 48 n.10.

[12] As the term has been used in this litigation, a substantive rule is a rule that is intended to, and potentially does, affect the outcome of a particular competitive event. The term is used to distinguish those rules from various rules that are not intended to affect the outcome—for example, rules of dress or decorum.

and extensively with issues of bias with respect to job-related terms and conditions—though affording no relief to respondent who, as an independent contractor, does not fall within its terms—Title III is concerned with discrimination against persons seeking to obtain goods and services at places of public accommodation. It is those customers that bring Title III into play, by making a private business into a "public accommodation," and it is those customers that, unlike persons working at places of public accommodation, are naturally said to "enjoy" the goods and services that the public accommodation has to offer. *See* 42 U.S.C. § 12182(a). Respondent is not in that category. Like a concert hall performer, or actor in a theatre production, respondent is helping to supply the entertainment at Tour events, not seeking to enjoy it.

This general understanding of Title III is reinforced by more specific provisions, which demonstrate that its protections extend only to customers, not workers, at places of public accommodation. Those provisions, enacted to make clear that a public accommodation neither diminishes nor enlarges its obligations by entering into contractual arrangements, specifically limit the scope of those obligations to its "clients or customers." *See* 42 U.S.C. § 12182(b)(1)(A)(iv). This limitation would be unexplainable if Title III generally covered other persons as well. Furthermore, insofar as persons working at public accommodations are concerned, these provisions detailing obligations to "clients and customers" stand in direct contrast to the comparable provision in Title I protecting "applicant[s] or employee[s]" against discrimination by means of contractual arrangements. *See* 42 U.S.C. § 12112(b)(2). The natural inference to be drawn from these different terms is that job-related discrimination at private entities is the subject of Title I, not Title III.

The legislative history confirms that fact. The relevant House Report states unequivocally that "Title III is not intended to govern any terms or conditions of employment by

providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990). Consistent with that plain statement, the analysis of Title III discusses the ability of the public (*i.e.*, clients and customers) to gain full access to goods and services, making no mention of discrimination with regard to job terms and conditions. The analysis of Title I is completely different: it is concerned with addressing impermissible discrimination in the workplace.

The application of Title III to persons (like respondent) providing goods and services at a place of public accommodation would also unsettle the balance struck in the Act as a whole. As it has done in other civil rights laws, Congress generally limited the scope of job-related protections to certain workers ("employees") and certain private businesses (largely those with 15 or more employees). If Title III is read to reach beyond those limits—for example, to protect independent contractors and employees at very small businesses—it will expose a wide variety of businesses, all of those covered by the broad definition of "public accommodation," to claims about possible workplace discrimination deliberately left uncovered by Title I. Indeed, plaintiffs in these newly-created lawsuits, by proceeding under Title III, could evade the procedural requirements established in Title I, including the obligation to file a charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. § 12117(a). Nothing in Title III, or in the Act as a whole, justifies this unnatural result.

II.

Title III, even if it applies to this claim, does not require entities operating places of public accommodation to "fundamentally alter" the nature of their goods or services. Although the Ninth Circuit acknowledged this fact, *see* J.A. 41, it utterly failed in its obligation to look closely at the nature of

the good or service (the "competitive athletic events") offered by the Tour. *See Southeastern Community College v. Davis*, 442 U.S. 397 (1979); *Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), petition for certiorari (No. 00-434) filed September 20, 2000. Had it done so, it would have recognized that the highest-level Tour competitions, like other comparable sports competitions, must be able to test the physical capability of all competitors according to a uniform set of substantive rules. *See Olinger*, 205 F.3d at 1005-07.

Most notably, the Ninth Circuit paid no attention to perhaps the most fundamental attribute of elite sports competitions: that all competitors are required to play by the same substantive rules. The goal of the highest-level competitive athletics is to assess and compare the performance of different competitors, a task that is meaningful only if the competitors are subject to identical substantive rules. For that reason the Tour, in its elite events, has never allowed any player to compete without observing the full measure of such rules applicable to all other competitors. The same is true for all professional or other championship-level sports: no sport grants waivers of its substantive rules to selected players.

The Ninth Circuit also disregarded a second elemental aspect of high-level sports: that they are tests of physical performance. That fact is central to evaluating a claim that a particular rule puts a particular competitor at a physical disadvantage. In contests of physical skill, it is inevitable that the requirements established for the competition will burden different competitors differently, precisely because they come to the competition with different physical strengths and weaknesses. That "inequality" simply reflects the varying challenges faced, to one extent or another, by all athletes in the highest-level events.

The Ninth Circuit, by neglecting these critical aspects of high-level sports, never came to a necessary understanding of the "nature" of Tour events. Instead, it engaged in a two-part

"balancing" test, asking whether a particular substantive rule is "fundamental" to the competition and whether a waiver of the rule would give the disabled competitor an "unfair advantage." But this analysis begins with a dubious premise: that, in applying Title III to professional sports, judges can and should create a more level playing field for competitors of different physical ability. Even if the questions asked by the Ninth Circuit could be answered accurately and objectively, the enterprise is flawed: the attempt to correct for individual physical disadvantages fundamentally alters the nature of elite sports competitions.

The inquiry conducted by the Ninth Circuit is also inherently standardless and subjective. The Ninth Circuit did not, and reasonably could not, explain how to tell a fundamental substantive rule from a non-fundamental one. Although it relied on a finding that the fatigue caused by walking "cannot be deemed significant under normal circumstances," J.A. 43, that carefully-worded finding, even read on its own terms, actually acknowledges that the "walking rule" does have an effect, sometimes a significant effect, on the outcome of golf tournaments. The importance of the rule is reinforced by the fact that it is observed, not just in the highest-level Tour events, but in every other comparable golf tournament throughout the world.

There is also no reliable way to decide, on a hypothetical basis, whether competitors obtaining waivers of a substantive rule have a "competitive advantage" over other competitors without a waiver. The nearly infinite variety of physical attributes of different athletes prevents such a comparison. Although the Ninth Circuit purportedly undertook that inquiry, it made no attempt to address the relative disadvantages of those golfers suffering from debilitating (though not necessarily "disabling") conditions, thus leaving out of the equation numerous golfers that would benefit greatly from being allowed to ride in a cart rather than having to walk the course

during a four-day tournament. Instead, it required a comparison between the disabled competitor and a hypothetical "able-bodied" competitor. Even if that comparison could be made, however, the results would be uncertain and, in any event, beside the point: Tour events test actual (not hypothetical) physical performance under uniform rules, and any selective waiver of those rules fundamentally alters the nature of Tour events.

ARGUMENT

I. TITLE III OF THE AMERICANS WITH DISABILITIES ACT PROVIDES NO BASIS FOR CLAIMS OF DISCRIMINATION BY PERSONS, LIKE RESPONDENT, WHO ARE NOT CLIENTS OR CUSTOMERS OF A PUBLIC ACCOMMODATION.

The first problem with the decision below is its erroneous, and potentially far-reaching, determination that Title III of the Act applies to a claim that challenges job-related terms and conditions at a place of public accommodation. This holding is both contrary to the language of Title III itself, which plainly indicates that its provisions are aimed at prohibiting discrimination against clients and customers of public accommodations, and inconsistent with the legislative record, which unequivocally confirms that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations . . . ." H.R. Rep. No. 101-485, pt. 2, 101st Cong., 2d Sess. 99 (1990) (House Report). Furthermore, it upsets much of the legislative balance reflected in the broad, but not unbounded, reach of Title I.

A. It is important, at the outset, to understand both the nature of Tour events and the specific claim asserted by respondent. As the district court observed, "the Tour is part of the entertainment industry, *offering competitive athletic events to the public*, which in turn generate sponsorship of the events,

network fees, advertising revenue, and ultimately, the tournament prize money awarded the competitors." J.A. 79 (emphasis added). Respondent does not claim that he is prevented from attending these "competitive athletic events" on equal terms with other members of the "public." Rather, he asserts that the refusal of the Tour to waive its rule requiring all competitors to walk during tournaments prevents him from earning his living *as a player in those events*. Specifically, respondent is alleging that he "cannot effectively compete [in Tour events] or obtain compensation, benefits, privileges or advantages from [Tour events] unless he is permitted to use a golf cart in [those events]." J.A. 93. Respondent thus seeks the opportunity to work in Tour events, not to watch them.

This claim, on its face, is nothing more than a straightforward discrimination-in-the-workplace complaint, charging that the failure of a business to adjust the terms and conditions for a particular job (*i.e.*, a player in Tour events) has the effect of excluding a disabled worker. As such, it might be expected to fall within the province of Title I of the Act, which directly and comprehensively addresses workplace bias. The text of Title I broadly prohibits discrimination against a "qualified individual with a disability" with respect to "job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C. § 12112(a). It further defines the term "qualified individual with a disability" in job-related terms, *i.e.*, whether the disabled person can, with or without accommodation, "perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). The specific anti-discrimination provisions of Title I then detail various forms of bias in the workplace, commonly and repeatedly speaking in terms of "job applicant[s] or employee[s]" (*id.* at § 12112(b)(1)), "equal jobs or benefits" (*id.* at § 12112(b)(4)), "employment opportunities" (*id.* at § 12112(b)(5)(B)), "job-related"

standards or criteria (*id.* at § 12112(b)(6)), and the like. *See Parker v. Metropolitan Life Ins. Co.*, 121 F.3d 1006, 1014 (6th Cir. 1997) (employment practices are governed by Title I of the Act).

The problem for respondent, however, is that Title I, while granting extensive protection to disabled workers, contains certain well-established limitations. For one thing, it generally applies only to employers with at least 15 employees. More important here, Title I, like other comparable civil rights laws dealing with workplace discrimination, *see, e.g.*, 42 U.S.C. § 2000e-2(a) (Title VII of the Civil Rights Act of 1964), applies only to employees, not independent contractors. *See Birchem v. Knights of Columbus*, 116 F.3d 310, 312 (8th Cir. 1997) (Title I of the ADA does not apply to independent contractors). Thus, although respondent invoked Title I to get a judicially-compelled waiver of Tour rules, his effort was unsuccessful: the district court made the factual determination that respondent, like all other Tour players, is an independent contractor rather than an employee. J.A. 58.

That ruling should have ended the matter. It did not, however, because the district court (and then the Ninth Circuit) turned to Title III of the Act (the "public accommodations" section) as a way to provide the very relief found unavailable under Title I.[13] Placing great weight on the fact that Tour events are played at places generally defined as public accommodations—either because the golf courses are "place[s] of exercise or recreation," 42 U.S.C. § 12181(7)(L), or, more plausibly, because they are (during a tournament) "place[s] of exhibition or entertainment," 42 U.S.C. § 12181(7)(C) (*see* J.A. 38)—the courts below arrived at the conclusion that Title III can be read to dictate the terms and conditions established for *competitors* in tournaments held by the Tour at those

[13] The full heading of Title III is "Public Accommodations and Services Operated by Private Entities."

courses. In so doing, the Ninth Circuit refused to draw a distinction between spectators seeking to attend Tour events and golfers seeking to perform in those events, expressly holding that Title III applies equally to claims of discrimination "in the pursuit of a living." J.A. 41. *See also* Resp. Br. in Opp. 11 ("Congress extended the protections of Title III to all 'individuals' at public accommodations, *regardless of Title I's potential applicability* . . . .") (emphasis added).

This holding cannot be squared with the language and history of Title III. To begin with, it is out of step with the common understanding of what Title III is meant to deal with. It is, after all, the persons patronizing a business, not the persons working for it, who distinguish an entity that is a public accommodation from an entity that is not. *See* House Report, pt. 3, at 54 ("sufficient" that entity in specified category "sells items to the public"). Although many private entities engage in businesses affecting commerce, a private entity is defined as a "public accommodation" within the meaning of Title III, and thus subject to its provisions, only because it makes its goods and services available to the general public—as opposed to, for example, selling those goods and services exclusively at wholesale. *See* 28 C.F.R. ch. 1, pt. 36, App. B, at 623. Given that the customers of a business are what bring Title III into play, it stands to reason that its legal obligations run to those same customers as well. Simply (if loosely) put, it is discrimination against buyers, not within sellers, with which Title III is concerned.

The terms of Title III confirm that understanding. The focus of the anti-discrimination provisions of Title III is on prohibiting discrimination in the *marketplace*, not discrimination in the *workplace*. *See generally* 42 U.S.C. § 12182(a) (General Rule), § 12182(b)(1) (General Prohibition), § 12182(b)(2) (Specific Prohibitions). Title III seeks to assure "the full and equal *enjoyment of* the goods, services, facilities, privileges, advantages, or accommodations of [a] place of public accommodation." 42 U.S.C. § 12182(a) (emphasis added). The most natural reading of this language indicates that Congress meant to assure equal treatment for the customers of places of public accommodation—that is, persons seeking to purchase or otherwise obtain the relevant goods and services—who (rather than persons there to work) are more appropriately said to "enjoy[]" what the public accommodation has to offer. For example, while spectators at a concert hall are presumably "enjoying" the entertainment offered by a public accommodation, it is highly awkward to apply that same language to performers on the concert hall stage. Like the golfers at a Tour event, they are *providing* the entertainment, not enjoying it. *See also* Brief for Casey Martin, C.A. 9, at 56 (Tour "revenue is contingent on the PGA employing touring golf professionals such as Mr. Martin to entertain the public").

Although respondent has argued that the "plain language" of Title III extends to all "individual[s]" at places of public accommodation, including those engaged in providing goods and services there, *see* Resp. Br. in Opp. 10-11 (citing 42 U.S.C. § 12182(a)), the most pertinent textual evidence contradicts that assumption. Section 12182(b)(1)(A)(iv) of the Act, which deals with the problem of indirect discrimination against an "'individual or class of individuals' . . . [through] contractual, licensing, or other arrangement[s]," specifically defines the term "[i]ndividual or class of individuals" to mean the "*clients or customers* of the covered public accommodation that enters into [a] contractual, licensing or other arrangement," *id.* (emphasis added), a description that obviously excludes persons working there. This definition serves an important, and telling, purpose. The operative language in subsections (i) through (iii), to which the definition of subsection (iv) is addressed, is intended to make clear that a public accommodation cannot *narrow* its obligations under Title III by resorting to contractual or other arrangements. *See* House Report, pt. 2, at 104 ("the reference to contractual arrangements is to make clear that an entity may not do indirectly

through contractual arrangements what it is prohibited from doing directly under this Act"). The point of the definition in subsection (iv) is to make equally clear that use of contractual arrangements does not *enlarge* those obligations. *See* House Report, pt. 2, at 104 ("a public accommodation's obligations are not extended or changed in any manner by virtue of its lease with [another] entity"). In short, whether a public accommodation enters into a contractual arrangement or not, it remains obligated to exactly the same "individuals": its "clients or customers." *See* House Report, pt. 2, at 104 ("[a] store's legal obligations extends [sic] only to individuals in their status as its own clients or customers . . . .").

The definition in subsection (iv) thus makes evident that Congress meant Title III to address discrimination only against "clients and customers" at places of public accommodation. While the definition applies directly just to subsection 12182(b), there is no reason to think that Congress narrowly drafted that subsection to protect only part of a broader class of "individuals" more generally protected by Title III. Put another way, if Title III as a whole applied to persons other than clients or customers—for example, persons like respondent engaged in performing, or otherwise providing goods or services, at places of public accommodation—it would be reasonable to expect that Congress would protect *all of them* against possible discrimination by means of "contractual, licensing, or other arrangement[s]," and not limit that protection to clients and customers alone. This expectation is reinforced by looking at the comparable provision of Title I of the Act, which bars "participat[ion] in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified *applicant or employee* with a disability to the discrimination prohibited by this subchapter . . . ." 42 U.S.C. §12112(b)(2) (emphasis added). Not only does this language point up an obvious contrast between the "applicant or employee" covered by Title I and the "clients or customers" covered by Title III, but it confirms that Congress

fully recognized the potential for indirect discrimination against workers by means of contractual and other relationships. *See* House Report, pt. 2, at 59; pt. 3, at 36-37. Given that fact, it would be inexplicable, if Title III actually applied to persons other than clients and customers, for Congress to shelter only the latter, and not the former, from discrimination of this type.[14]

The legislative history, likewise, shows unmistakably that Title III is concerned with discrimination against customers, not workers. Most notable is language in the House Report, which states, in the plainest terms, that "Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation." House Report, pt. 2, at 99. In keeping with this declaration, the analysis of Title III, like the text of Title III, contains no discussion of discrimination with respect to job terms and conditions, instead addressing the ability of the public (*i.e.*, clients or customers) to gain full and equal enjoyment of the goods and services provided by places of public accommodation. *See* House Report, pt. 2, at 99-129, pt. 3, at 53-69.[15] By contrast, the analysis of Title I in the House

---

[14] This case does not involve the question whether Title III requires special treatment for a client or customer of a place of public accommodation who is simultaneously pursuing some job-related function (*e.g.*, doing research at a public library), above and beyond that extended to ordinary clients and customers. As explained in the text, respondent, insofar as he is part of the tournament itself, is not a client or customer at all.

[15] The House Report does indicate that the provisions in Title III dealing with new construction and alterations to existing facilities generally call for work and public areas to be made accessible to disabled persons at public accommodations and "commercial facilities." *See* House Report, pt. 2, at 116-21, pt. 3, at 62-66; 42 U.S.C. § 12183. The Report makes clear, however, that this provision is not meant to convert Title III into a counterpart of Title I, imposing a supplemental set of standards for individual employees at public accommodations. *See* House Report, pt. 2, at 117. "The legal requirements of the two titles . . . are separate and independent." *Id.*

Report, like the text of Title I itself, is replete with discussion about what constitutes discrimination in the workplace. *See* House Report, pt. 2, at 54-83, pt. 3, at 31-49.

The focus of Title III on clients and customers helps to explain why it confers no right to enter private areas (generally, work areas) at a place of public accommodation. Whether those areas are deemed separate from the place of public accommodation or treated as private spaces within it, *see* Brief of United States Golf Ass'n as *amicus curiae* at 8-19, the fact is that no "customer or client" of the public accommodation, disabled or not, is entitled to be there. As the USGA brief points out, for example, members of the public are invited to attend events at theatres and stadiums only as part of the audience; they are not given the privilege of going onto the stage or playing field. Each of those areas, like the area "inside the ropes" during a golf tournament, is reserved for persons performing what the audience is there to see. A claim seeking access to those areas thus cannot be brought as a client or customer seeking equal treatment with other clients and customers: it must be brought as a prospective performer (or other worker) seeking treatment not provided to clients and customers at all.

All this makes abundantly clear that Title III does not provide a basis for the specific claim brought by respondent. Whatever may be the actual merits of that claim, *see* pages 30-41 *infra*, respondent is not suing in the capacity of a "client or customer" at Tour events. At the professional golf tournaments put on by the Tour—where the golf course is temporarily diverted from its typical use as a "place of exercise or recreation" into a "place of exhibition or entertainment"—the "clients and customers" of the Tour, and thus the "individuals" to whom Title III is addressed, are the spectators and other attendees who are there to watch the tournament. Respondent is obviously not seeking to be placed on equal terms with them, but rather to be included among a

totally different group: the *golfers* paid to be part of the entertainment that the Tour provides.[16] In that respect, respondent is no different from an actor, or a musician, or, for that matter, any other prospective worker complaining of discriminatory practices at a place of public accommodation.[17]

The Ninth Circuit never came to grips with this basic fact. Although the court of appeals compared respondent to a student at a private university (J.A. 40)—another form of public accommodation under § 12181(7)(J)—the apt analogy is not to a student at the university, but to a teacher. Like respondent, a university teacher is working at a place of public accommodation in order to provide, or perhaps to be part of, the goods and services (there, education) that the clients and customers (there, the students) are meant to acquire. But the fact that the university hiring the teacher operates a place of public accommodation, and thereby comes within the reach of Title III insofar as its students are concerned, does not suddenly confer on the teacher a new bundle of discrimination-in-the-workplace rights that are unavailable to workers at other private businesses. The same is true here: when respondent seeks access to a golf course as a participant in Tour events, he becomes part of the business of providing entertainment to the spectators. His claim of discrimination

---

[16] In the Title III section of his complaint, respondent specifically asserted that the Tour had failed to provide him "with a good, service, facility, privilege, advantage or accommodation or other opportunity that is as effective as that *provided to others on the NIKE and PGA TOURS*." J.A. 94 (emphasis added).

[17] The Justice Department has said that "performing artist[s]" at a theatre or concert hall may be subject to suit as defendants under Title III on the grounds that they are leasing, or otherwise operating, places of public accommodation. *See* 28 C.F.R. ch. 1, pt. 36, App. B, at 629. This view is plainly inconsistent with the idea that Title III treats performers in the same manner as members of the audience, who are potential plaintiffs, rather than defendants, under those provisions.

about job-related terms and conditions is thus cognizable, if at all, only under Title I, not Title III.[18]

B. The extension of Title III to work-related claims also upsets much of what Congress did in limiting the coverage of Title I to "employees" and "covered" employers. *See* 42 U.S.C. § 12112(a). Most particularly, it opens the door to numerous job-related claims by workers, like respondent, deliberately left uncovered by Title I. Indeed, that is precisely the result that respondent argues for. *See* Resp. Br. in Opp. 11. But the language and structure of the Act will not allow this end-run around Title I.

It is important to recognize that the limitations embodied in Title I of the Act are anything but unusual. In numerous civil rights laws, Congress has chosen to grant job-related protections mostly to "employees" of relatively large private employers. Like Title I here, the comparable provisions in Title VII of the Civil Rights Act of 1964 (from which the definitional provisions in Title I of this Act are generally taken, *see* House Report, pt. 2, at 54), and in the Age Discrimination in Employment Act, forbid discrimination with respect to "employment" and "employment opportunities," and against "employees or applicants" of covered employers (generally those with at least 15 employees), rather than against all workers in all work situations. *See* 42 U.S.C. § 2000e-2(a)(1), (2); 42 U.S.C. § 2000e(b), (f); 29 U.S.C. § 623(a)(1)-(3). Similarly, Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, from which the substantive (though not the definitional) provisions of Title I are derived, *see* House Report, pt. 3, at 31, generally provides safeguards against discrimination with respect to "employment" and "employment

[18] A golfer seeking access to a golf course for its usual recreational purposes would, by contrast, be a "client or customer" of that public accommodation.

opportunities." *See Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 632-34 & n. 12 (1984).

This deliberate choice reflects an intent to create obligations for the benefit of common-law employees, and not other workers such as independent contractors. *See, e.g., Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 492-93 (7th Cir. 1996) (independent contractors not protected by Title VII of Civil Rights Act); *EEOC v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983) (independent contractors not protected by Age Discrimination in Employment Act). *See also Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-27 (1992). Indeed, as this Court recently noted, Congress has shown little tolerance for judicial efforts to set aside that intent in favor of more sweeping interpretations. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 322-27; *Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166-68 (1971); *see also Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-41 (1989). For example, after this Court expansively construed the term "employee" in the National Labor Relations Act—giving it a broad meaning "in the light of the mischief to be corrected and the end to be attained," *see NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 124 (1944) (internal quotation marks omitted)—Congress promptly revised the statute to make clear that this ends-oriented reading was unwarranted. *See Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. at 324-25. The Ninth Circuit decision in this case, however, simply skins the cat a different way: by using Title III to reach the job-discrimination claim made by respondent (an independent contractor), it has similarly stymied efforts by Congress to target the workplace rights conferred by the statute to common-law employees. That result is at odds with the explicit terms of the Act.[19]

[19] The reading given to Title III below also fits poorly with the idea that the Act "extend[s] to [disabled persons] the same civil rights protections provided to women and minorities beginning in 1964." House Re-

It is also implausible to think that Congress actually meant Title III to cover what Title I so pointedly left out. Although this Court has recognized that Congress may deal with a single problem in multiple statutory provisions, *see generally North Haven Bd. of Ed. v. Bell*, 456 U.S. 512 (1982) (applying Title IX of the Civil Rights Act of 1964 to employment disputes), it has first looked closely at the text, and legislative history, of the relevant legislation to find persuasive evidence of that intention. *See North Haven Bd. of Ed.*, 456 U.S. at 520-35 (discussing statutory language and legislative history). *Cf. Menkowitz v. Pottstown Memorial Med. Ctr.*, 154 F.3d 113 (3d Cir. 1998).[20] Here, the evidence is all to the contrary: as we have discussed, *see* pages 18-22 *supra*, not only is the text of Title III totally silent about workplace discrimination, the legislative history states unequivocally that Title III is not meant to overlap with Title I. *See* House Report, pt. 2, at 99 ("Title III is not intended to govern any terms or conditions of employment by providers of public accommodations or potential places of employment; employment practices are governed by title I of this legislation"). Were that not enough, the relevant regulations reflect the same separation: the

port, pt. 3, at 26. Neither women nor older workers can turn to "public accommodations" laws as an alternative basis for job-discrimination suits because the Age Discrimination in Employment Act has no such provision, and Title II of the Civil Rights Act of 1964 (the "public accommodations" provision of that Act) does not apply to discrimination based on sex. *See* 42 U.S.C. § 2000a. And, while that latter section does apply to racial discrimination in public accommodations, it does not make any reference to employment discrimination at those places. *Id.*

[20] In *Menkowitz* the Third Circuit held that Title III provided a basis for a claim by a staff physician (an independent contractor) seeking hospital staff privileges. Although the result in that case may depend more on the nature of hospital privileges than on a general principle to be derived from Title III, the partial dissent correctly pointed out that, in any event, the majority failed to undertake a sufficient analysis of the interplay between Title I and Title III of the Act. *See id.* 125-28 (Scirica, J., dissenting and concurring).

regulations under Title I (promulgated by the Equal Employment Opportunity Commission) deal comprehensively with discrimination in the workplace, *see* 29 C.F.R. ch. xiv, pt. 1630, § 1630.1 *et seq.*, while the regulations under Title III (promulgated by the Attorney General) are concerned with assuring equal opportunity in the marketplace. *See* 28 C.F.R. ch. 1, pt. 36, § 36.101 *et seq.*[21]

The effort to extend Title III to workplace disputes also confounds common sense. It is hard to see why Congress would deliberately limit coverage in Title I of the Act only to expand it greatly—and with no mention of doing so—in Title III. And, if Congress had wanted to extend the protections of the Act to independent contractors (and to workers at businesses with only a small number of employees), why would it take that step only for places of public accommodation? It is much more likely that, if it had meant to grant this broader coverage, Congress would just have addressed the matter openly in Title I. Not only would that direct treatment have eliminated any confusion about its intentions, it would also have had the very real virtue of assuring that allegations of discrimination in the private workplace would be analyzed according to consistent, and job-specific, standards, rather than by a creative reading of provisions aimed at a wholly different problem.

Finally, the decision below ignores the fact that Congress had well-understood reasons for limiting coverage of the Act to certain workers and to certain covered employers. While Congress granted broad new protections to disabled persons,

[21] Section 504(d) of the Rehabilitation Act, in seeking to harmonize standards under that Act and the Disabilities Act, also focuses attention on Title I, not Title III. *See* 29 U.S.C. § 794(d). It provides: "The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. § 12111 *et seq.*) and [certain provisions of title IV], as such sections relate to employment." *Id.* The section makes no mention of Title III in connection with "employment discrimination."

including disabled workers, it recognized that the Act, like other anti-discrimination laws, would give rise to a significant increase in litigation against private businesses. *See EEOC v. AIC Security Investigations, Inc.*, 55 F.3d 1276, 1281 (7th Cir. 1995). The Seventh Circuit has observed, for example, that the decision to limit covered entities to employers with at least 15 employees "struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims." *EEOC v. AIC Security Investigations, Inc.*, 55 F.3d at 1281; *see generally United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979) ("Title VII [of the Civil Rights Act] could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business"). Congress struck a similar balance in extending the substantive protections of the Act, and the concomitant right to sue, only to workers defined as employees (or prospective employees), not to the millions of additional persons—many of them transitory or occasional workers—who offer their services as independent contractors. *See generally The New York Times*, October 11, 2000, at C5 ("As of February 1999, a total of 8.2 million workers—or 6.3 percent of the work force—were independent contractors, according to the Bureau of Labor Statistics").

The potential consequences of applying Title III to job-related requirements for all workers in all places of public accommodation are truly extraordinary. The definition of a "public accommodation" includes, among other things, most places of lodging, restaurants, retail establishments (grocery stores, hardware stores), service establishments (dry cleaners, lawyers' offices, pharmacies, doctors' offices), schools (from nursery through postgraduate), day-care centers, and gymnasiums. *See* 42 U.S.C. § 12181(7)(A)-(L). Many of those establishments, it may be assumed, have fewer than 15 employees and utilize, at least on occasion, independent contractors

to provide goods and services to the public. If respondent is correct, it would mean that hiring or other job-related decisions at each of those establishments—presently understood to be outside the scope of the Act—would suddenly be the basis of potential litigation, just like the decisions of employers that Congress deliberately made subject to coverage under Title I.[22] Indeed, workers (or potential workers) bringing claims under Title III would actually be in a *preferred* position because they could avoid the procedural requirements of Title I, including the directive to file a timely charge with the Equal Employment Opportunity Commission. *See* 42 U.S.C. §12117(a) (incorporating charge requirement for claims of discrimination under Title I). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (rejecting expansive reading of 42 U.S.C. § 1981 in part because it would "undermine the detailed and well-crafted procedures for conciliation and resolution of Title VII claims"); *Zimmerman v. Oregon Dept. of Justice*, 170 F.3d 1169 (9th Cir. 1999), petition for certiorari (No. 99-243) filed August 10, 1999 (Title II does not apply to persons working at governmental facilities).[23]

---

[22] Although this case involves only the application of Title III to a professional golfer working as an independent contractor, respondent draws no distinction between workers in that category and employees in businesses with fewer than 15 employees, *See* Resp. Br. in Opp. 11. In his view, the critical fact is not the type of worker, but the fact that he or she is working at a place of public accommodation. *See id.*

[23] There is a split among federal courts of appeals regarding whether Title II (the Public Services title) applies to the terms and conditions of employment for government workers. *Compare Zimmerman v. Oregon Dept. of Justice*, *supra*, with *Bledsoe v. Palm Beach County Soil & Water Conservation Dist.*, 133 F.3d 816 (11th Cir.), *cert. denied*, 119 S. Ct. 72 (1998); *Holmes v. Texas A & M Univ.*, 145 F.3d 681 (5th Cir. 1998); *Doe v. Univ. of Maryland Med. Sys.*, 50 F.3d 1261 (4th Cir. 1995). Because the wording and legislative history of Title II and Title III are quite different, the questions posed by those cases are not the same as the questions presented here.

There is no justification for this judicial restructuring of the Act. While Congress indisputably sought to expand employment opportunities for disabled individuals, it did so in a specific way, identifying the businesses and workers that it intended to make subject to the Act. By extending Title III beyond clients and customers to providers of goods and services as well, the Ninth Circuit read those limitations out of the Act, making Title III a backstop for claims of workplace discrimination not covered by Title I. This unwarranted expansion of the Act should not stand.

II. TITLE III DOES NOT REQUIRE THE TOUR TO FUNDAMENTALLY ALTER THE NATURE OF ITS CHAMPIONSHIP-LEVEL EVENTS BY ALLOWING DIFFERENT COMPETITORS TO PLAY BY DIFFERENT SUBSTANTIVE RULES.

A. The Ninth Circuit was also mistaken in holding that Title III requires professional sports organizations to modify their substantive competitive rules to accommodate disabled competitors. *See* note 12 *supra* (defining the term "substantive rule"). Even if Title III does extend to job-related claims, the modification of terms and conditions sought here—the waiver of a substantive rule of competition for one particular competitor—would fundamentally alter the nature of the competition itself. Paying too little heed to the importance of uniform rules in contests of physical skill, the court of appeals simply missed that essential point. *See Olinger v. United States Golf Ass'n*, 205 F.3d 1001 (7th Cir. 2000), petition for certiorari (No. 00-434) filed September 20, 2000.

Although the Act generally requires private entities operating places of public accommodation to make reasonable modifications to their policies in order to accommodate disabled persons, it contains an important limitation: those entities need not make modifications that "would fundamentally

alter the nature" of the particular goods and services being offered. *See* 42 U.S.C. § 12182(b)(2)(A)(ii). The critical question, therefore, is whether the waiver of a substantive rule for one competitor in an elite athletic competition fundamentally alters the nature of the competition. The Ninth Circuit decided that the answer depends upon a fact-intensive analysis, weighing the relative importance of the specific rule and the "individual circumstances" of the disabled athlete. *See* J.A. 45. But this approach misapprehends the proper statutory inquiry: to determine whether a proposed modification (waiver of a substantive rule) would "fundamentally alter the nature" of a particular good or service (the elite athletic competition), the inquiry must focus primarily on the nature of the good or service. Had the Ninth Circuit—like the Seventh Circuit in *Olinger*—given proper attention to that part of the equation, it would have recognized that the highest-level Tour competitions, like any other elite sports competition, must be able to test the physical capability of all competitors according to a uniform set of substantive rules.

The statutory point is a simple one: that a court cannot tell whether a particular change in policy will "fundamentally alter" the nature of a good or service without giving close scrutiny to what the basic nature of that good or service is. This Court followed just that approach in *Southeastern Community College v. Davis*, 442 U.S. 397, 410 (1979)—the decision from which the statutory phrase ("fundamentally alter") is derived (*id.*)—making clear that Section 504 of the Rehabilitation Act did not compel a business entity (there, a nursing school) to make a critical change in what it traditionally does. *See id.* at 410-11. In so doing, the Court placed special emphasis on the usual requirements of the particular nursing program at issue. *See id.* at 413 ("Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person"). *See also Alexander v. Choate*, 469 U.S. 287, 300 (1985) (noting "legitimate interests of federal

grantees in preserving the integrity of their programs"); *School Bd. of Nassau County, Florida v. Arline*, 480 U.S. 273, 287 n.17 (1987). Likewise, in *Olinger*, the Seventh Circuit recognized that Congress, in setting out the anti-discrimination provisions of Title III, did not intend to "require entities to change their basic nature, character, or purpose insofar as that purpose is rational, rather than a pretext for discrimination." *Olinger*, 205 F.3d at 1005. It then took care to examine the manner in which championship-caliber golf tournaments are conducted, ultimately deciding that uniform application of the "walking rule" was necessary to maintain the integrity of those events. *See Olinger*, 205 F.3d at 1006-07.

The need for a close look at what a particular enterprise actually does—that is, at the existing nature of the relevant good or service—is also reflected in regulations promulgated under Title III. For example, the Department of Justice has said that neither Title III itself, nor the applicable regulations, would "require the inventory of goods provided by a public accommodation to be altered to include goods with accessibility features." 28 C.F.R. ch. 1, pt. 36, App. B, at 641. Accordingly, in applying the "fundamentally alter" language of the Act, the Department has taken the position that a bookstore is not obligated "to stock Brailled books or order Brailled books, *if it does not do so in the normal course of its business*." *Id.* (emphasis added). This focus on "the normal course of [a] business" is then carried forth through other examples in the regulations, which similarly call for a careful inquiry to determine what the course of a particular business actually consists of. *Id.*

The inquiry conducted by the Ninth Circuit, however, was both one-sided and incomplete. Most significantly, the court of appeals paid no attention whatever to perhaps the most fundamental attribute of professional sports in general, and of elite golf tournaments in particular: that all competitors are

required to play by the same substantive rules. In our view, it is impossible to understand the "nature" of the highest-level athletics without considering, and assigning proper weight to, that fact. Given that the goal of athletic competition is to compare the performance of different competitors, it is critical to the legitimacy of that comparison that each participant perform the same set of prescribed tasks. J.A. 249-50. *See Olinger*, 205 F.3d at 1006 (evidence "supports the golf community's insistence that all players play all tournaments under the same conditions and rules").

That principle applies with full force to the championship-level events conducted by the Tour. As the Rules of Golf provide, "the Game of Golf consists in playing a ball from the *teeing ground* into the hole by a *stroke* or successive strokes in accordance with the Rules." J.A. 104; Rules of Golf, Rule 1.1. Prior to the injunction in this case, the Tour had never allowed any golfer to play in its highest-level tournaments (the competitions at issue here) without adhering to all of the governing substantive rules. Those rules include not just the numerous rules applicable to both elite and recreational golf, but also additional rules specifically designed to make the elite competitions more demanding. *See* pages 3-4 *supra*. The Tour imposes strict penalties for violation of the rules, ranging from the addition of strokes to disqualification from the tournament. *See* J.A. 104-07.

The Ninth Circuit also failed to acknowledge a second central aspect of high-level sports: that they are contests of *physical* performance. Yet the fact that professional sports test physical performance is highly relevant to evaluation of a claim that the rules of a particular sport unlawfully penalize physical disability. Despite the views of the Ninth Circuit, it is inevitable, even desirable, that the requirements of a professional sport will burden different players differently, precisely because they come to the competition with unequal physical attributes. Individual competitors may or may not be

able to compensate for those physical disadvantages, but, if they cannot, the resulting "inequality" is not discrimination in any meaningful sense (including the sense contemplated by Title III), but simply a reflection of the varying challenges faced, to a greater or lesser degree, by all athletes in elite athletic competitions. Those competitions reward superior physical performance, without adjusting the standards from competitor to competitor to allow for more equal results.

The Seventh Circuit, unlike the Ninth Circuit, took note of the basic character of competitive sports, observing that "[t]he point of an athletic competition . . . is to decide who, under conditions that are about the same for everyone, can perform an assigned set of tasks better than (not as well as) any other competitor." *Olinger*, 205 F.3d at 1006 (internal quotation marks omitted). *See also The American Heritage Dictionary of the English Language* at 1742 (3d ed. 1992) (defining "sport" as "[a]n activity involving physical exertion and skill that is governed by a set of rules or customs and often undertaken competitively"). Insofar as elite competitions are concerned, this view reflects a universal experience: no professional sport—not baseball, not tennis, not soccer, not basketball, not track and field—allows, or has allowed, a chosen competitor to play by different rules. The long consistent history of requiring adherence to uniform rules, both in golf and in other sports, reflects a shared understanding of what high-level athletic competition is all about: a test of physical proficiency for different competitors under identical rules. It follows, therefore, that any waiver of a substantive rule for a given competitor is out of keeping with the fundamental premise of professional sports.

The importance of uniform rules does not mean, as the Ninth Circuit supposed (J.A. 45), that professional sports organizations, merely by making up arbitrary rules, may exempt themselves from the Act. It remains entirely appropriate for a court to question whether a particular rule may, in fact, have a

possible (non-trivial) effect on the outcome of the athletic competition. (If not, it could be waived for *any* competitor, disabled or non-disabled, without changing the competition.) Thus, for example, the Seventh Circuit, while examining the nature of the United States Open golf championship, looked at the record both to determine that the rule was not a pretext for discrimination and to assure that the rule (and thus a waiver of the rule) could actually affect performance in the competition. Having assured itself on those points, however, the Seventh Circuit correctly acknowledged that professional sports organizations have a need for uniformity in the application of their substantive rules that is different from, and greater than, the need of business entities that do not, by their very nature, seek precisely to evaluate and reward differences in physical performance.[24] That is just the sort of careful analysis that the "fundamental alteration" standard calls for.

B. The Ninth Circuit took a very different view. Rather than give any weight to the importance of uniform rules, it held that it was free to grant waivers of any substantive rule for disabled competitors so long as it determined, *first*, that the particular rule was not "fundamental" and, *second*, that the waiver would not give the disabled competitor an "unfair advantage" over other competitors. This effort at redefining

---

[24] This need for uniformity does not vary with the "individual circumstances" of a particular competitor, and an examination of those circumstances in this context is thus neither necessary nor justified. It may be appropriate, however, if the nature of the good or service in question is different. *See, e.g., Washington v. Indiana High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir.), *cert. denied*, 120 S. Ct. 579 (1999). In *Washington*, for example, the court of appeals noted that the association had already provided for selective waivers of its eligibility rule, thereby demonstrating that uniform application of the rule was not integral to the nature of high school competition. In those circumstances, there was no evident reason not to make the same accommodation for qualified disabled athletes. *See also Sandison v. Michigan High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Missouri State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994).

the competition, however, falls short on a number of different fronts.

To start with, we question the core premise upon which the Ninth Circuit proceeded: that, in applying Title III to professional sports, judges can and should create a more level playing field for competitors of different physical ability. As we have discussed, *see* pages 32-34 *supra*, the highest-level athletic competitions are designed specifically to test performance under common rules, rewarding those who achieve the best results with whatever physical attributes they do, and do not, bring to the competition. That (actual) contest is necessarily and profoundly changed by making it subject to a before-the-fact (imaginary) contest, with a judge evaluating each rule and each competitor to determine who can be excused from compliance with a particular rule without unduly skewing the possible results. However well-meaning, the enterprise itself is flawed: to correct for individual physical disadvantages fundamentally alters the essence of any high-level athletic competition.

This hypothetical comparison is also inherently unreliable and unworkable. Although the Ninth Circuit apparently believed it possible to decide whether a particular substantive rule is fundamental to a particular sport, this inquiry is doomed from the outset by the lack of any coherent standard to guide it. In this case, for example, all the court could point to as support was a finding that "the fatigue factor injected into the game of golf by walking the course cannot be deemed significant under normal circumstances." J.A. 43. But the most important thing about this finding is not what it rejects, but what it accepts: that the "walking rule" *does affect* the outcome of some high-level golf tournaments. *See also Olinger*, 205 F.3d at 1007.[25] Even taking the finding at face

[25] The effect need not be great to have a significant impact on the competition. In 1997, for example, the difference in average score between the number one and number 100 PGA TOUR scoring leaders was 2.32 strokes per round over the course of the entire year. Reporter's Transcript at 780-82.

value, it is common ground that the fatigue associated with walking the golf course during four rounds of a tournament may routinely have at least some effect—and, at times, may have a highly significant effect—on the competition. If not always decisive, therefore, it is an ever-present factor in the outcome of Tour events.

The reliance of the Ninth Circuit on this finding thus reveals the arbitrary character of its fundamental/non-fundamental rule test. Once it has been determined that a rule established for a particular competition is potentially "outcome-affecting"—as was the case here—it seems self-evident that the rule cannot be changed or eliminated without redefining the competition itself. Indeed, despite its ultimate conclusion, the Ninth Circuit never went so far as to say, and could not reasonably have said, that championship-level golf tournaments would be more or less the same without any "walking rule" at all. The "walking rule" has been an integral part of Tour competitions since their inception, J.A. 174, 245, 248-53, serving to make the physical requirements of those tournaments more exacting and to distinguish those top-level competitions from other, less demanding competitions. *See* J.A. 258-60. And the "walking rule" is observed without exception in every other elite golf tournament throughout the world—from the Masters and United States Open in this country to the British Open and similar tournaments overseas. J.A. 164-67, 187-88, 192.

It is true, of course, that golf does not separately measure the act of walking the course: the only score recorded is the number of strokes taken from the teeing ground to the hole. But this fact does not mean that the task of shot-making and the task of walking during the competition are disconnected. *See* J.A. 65 (purpose of the walking rule is "to inject the element of fatigue *into the skill of shot-making*") (emphasis

added). To the contrary, the ability of each player to handle the physical demands of walking the golf course has a direct effect on his ability to execute shots with the needed power and precision. *See, e.g.*, J.A. 174-78 (testimony of Arnold Palmer); J.A. 189-91 (testimony of Jack Nicklaus). As the Seventh Circuit observed, the history of golf is filled with stories of players that managed to overcome physical exhaustion and discomfort in order to win important championships. *See Olinger*, 205 F.3d at 1006-07. The other, more anonymous side of the coin, however, is the experience of numerous tiring golfers who gradually fall by the wayside in the same events, unable to make the necessary shots in the final holes of the final round of a 72-hole tournament.

Even respondent has not challenged the "walking rule" directly, although he has questioned the need to apply it uniformly, pointing out that the Tour sponsors other tournaments in which players can either walk or use golf carts. Resp. Br. in Opp. 16-19. But these are two different points. There are no Tour-sponsored tournaments at which different players are subject to different substantive requirements or prohibitions. What respondent refers to are different events (such as tournaments involving senior golfers) where the Tour does not employ the "walking rule" and where each golfer can choose how to get around the course. All that demonstrates, of course, is that some golf tournaments can be played without a walking requirement, a fact that the Tour acknowledges.[26] The highest-level Tour events (the tournaments that respondent is suing about) are very different: those tournaments

[26] The fact that golf can be (indeed, usually is) played without a "walking rule" is no more relevant to the need for its uniform application at the highest levels of the sport than the fact that baseball can be (indeed, usually is) played with metal, rather than wooden, bats. Major-league baseball requires that all players use wooden bats, and it would "fundamentally alter" major-league baseball to allow some players, even if disabled, to play with metal bats instead.

invariably require, and have always required, that all golfers walk the golf course during the competition. *See* J.A. 64 ("[n]o waiver [of the "walking rule"] has ever been granted for individualized circumstances (such as disability)").

The second part of the Ninth Circuit inquiry—looking to whether the waiver of a substantive rule would give a disabled competitor an "unfair advantage" (J.A. 46)—is also insupportable. Leaving aside that this question should not be asked at all, *see* page 36 *supra*, there is, just as for the question of fundamental/non-fundamental rules, no reliable or consistent way to answer it. Any genuine comparison among individual athletes must take into account an almost infinite variety of physical attributes, ranging from height to strength to eyesight to coordination to stamina, and so on. Against this background of physical differences, the task of conducting an accurate hypothetical contest between one competitor and another, with each performing under different substantive rules, is too great for any fact-finder.[27] That is hardly surprising: much of what makes competitive sports so intriguing is that the ultimate results are, by nature, fluid and unpredictable. There is no sound way to anticipate or replicate those results in judicial proceedings.

The problem is well demonstrated in this case. While no one questions the effort shown by respondent, it is simply guesswork whether his use of a cart gives him an advantage over other competitors at a Tour event. It would be hard enough to find an answer to that question if all other golfers were the same (for example, the "able-bodied competitor" posited by the Ninth Circuit), but, in fact, different golfers react quite differently to the demands of walking a golf course

[27] Medical experts on both sides testified at trial that, because of physical differences and numerous other variables that affect fatigue, it is "impossible" to compare the levels of fatigue experienced by different individuals or to compare the relative effects of such fatigue. J.A. 193-94, 210-12.

during four or more rounds of a professional tournament. Even assuming that some fit, injury-free golfers might at times prefer to walk the course, other golfers at a Tour event suffer from severe physical conditions (bad backs, sore knees and ankles, arthritis, diabetes) that are made significantly worse by extensive walking. *See* J.A. 168-69. While these conditions are not necessarily "disabling," they prevent golfers from being able to play at all in particular tournaments and, at the very least, significantly increase the fatigue associated with walking the course. Many players affected by those conditions would thus find it easier to play Tour events with the benefit of a golf cart, as would golfers in poor physical condition. Does a player like respondent, who has a disability within the meaning of the Act but also a waiver from the "walking rule," have a competitive advantage over each of those players? In our view, it is impossible to know. Even if a fact-finder made a comparison with each golfer at each tournament on a case-by-case basis, there is no reason to be confident that the answers, whatever they were, would be correct.[28]

It would also impose a substantial burden on the Tour to conduct these comparisons. *See Olinger*, 205 F.3d at 1005-06. If the point is to determine whether the waiver of a rule for a particular competitor would give him an unfair advantage over each other competitor, the Tour would need to turn to a staff of medical specialists to determine the nature of the particular condition at issue and, presumably, the effect on performance of granting a waiver. It then would

[28] The courts below plainly stacked the deck by choosing a single point of comparison ("the able-bodied" golfer) for their evaluation of possible competitive advantage. For example, even if the term means only "non-disabled," this analysis ignores numerous golfers with injuries or other ailments who are unable to compete in certain tournaments at all but who might be able to with a cart. *See* J.A. 168-73. It is certainly arguable that respondent, who is able to compete in those tournaments with the benefit of a cart, has a distinct advantage over golfers in that situation.

have to evaluate the *relative* disadvantage suffered by all other golfers, each of whom has his own distinctive physical attributes. Even if this were feasible, which it is not, it would still be a poor substitute for what Tour competitions have always been: a test of physical ability under uniform rules.

We submit, therefore, that Title III is not fairly read to require professional sports organizations to change their substantive rules in order to accommodate disabled competitors. Although Title III does instruct operators of public accommodations to modify certain policies for the benefit of disabled persons, Congress was aware that the remedial goals of the Act would sometimes come into conflict with other important interests; in particular, it recognized that an otherwise reasonable modification might cause a fundamental change in the nature of a good or service. For those cases, Congress specifically set forth what should happen: by its express terms, the Act does not require the organization providing that good or service to "fundamentally alter the nature" of what it does. That principle is controlling here. It is essential to the nature of high-level Tour events that all competitors, without exception, play by the same substantive rules, and the Ninth Circuit failed to grant that interest its proper statutory weight.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

H. BARTOW FARR, III*
RICHARD G. TARANTO
FARR & TARANTO
1850 M Street, NW
Suite 1000
Washington, DC 20036
(202) 775-0184

WILLIAM J. MALEDON
ANDREW D. HURWITZ
OSBORN MALEDON, P.A.
2929 North Central Avenue
Suite 2100
Phoenix, AZ 85012
(602) 640-9000

* Counsel of Record